

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Joseph A. Sofio)	File No. 0006670108
)	
Application for AWS-3 Licenses in the)	
1695-1710 MHz, 1755-1780 MHz)	
and 2155-2180 MHz Bands)	

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 2017**Released: February 28, 2017**

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we affirm the denial, in part, of a request for confidential treatment under Section 0.459 of the Commission's rules.¹ Joseph A. Sofio ("Mr. Sofio" or "Applicant")² requested confidential treatment for certain information disclosed to the Commission in his application for various AWS-3 licenses.³ The Broadband Division (Division) of the Wireless Telecommunications Bureau denied in part the request.⁴ For the reasons discussed below, we affirm the Division and deny the Application for Review (AFR).

II. BACKGROUND

2. *Claim for Designated Entity Status.* Mr. Sofio was the winning bidder for 28 licenses offered in Auction 97 with net provisionally winning bids totaling \$13,483,500 (net of a requested "very small business" bidding credit of \$4,494,500).⁵ Mr. Sofio applied in his individual capacity and certified that he was a designated entity ("DE"). If found to be a DE, he would be eligible for a 25 percent bidding credit available to a very small business, which for Auction 97 was defined as an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, had average gross revenues that were not more than \$15 million for the preceding three years (2011-2013).⁶

3. *Long-form Application.* Applicants seeking bidding credits are required to adhere to reporting requirements, including disclosure of affiliates or agreements. In his initial application of February 13, 2015, Mr. Sofio represented that he had no affiliates or agreements to disclose. The staff

¹ 47 C.F.R. § 0.459.

² Application for Review of Joseph A. Sofio (filed Dec. 16, 2015).

³ File No. 0006670108, Exhibit E: Request for Confidential Treatment (filed April 2, 2015) ("Confidentiality Request"); Exhibit E: Supplemental Request for Confidential Treatment (filed April 21, 2015) ("Supplemental Confidentiality Request") (collectively, the Request).

⁴ See *Request for Confidentiality, Application of Joseph A. Sofio for AWS-3 Licenses in the 1695-1710, 1755-1780 MHz and 2155-2180 MHz Bands*, File No. 0006670108, Letter Order, 30 FCC Rcd 13651 (WTB BD 2015) (*Letter Order*). On the same date, the staff notified counsel of the partial denial by telephone. See 47 C.F.R. § 0.459(g).

⁵ See *Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97*, Public Notice, 30 FCC Rcd 630 (WTB 2015) (*Winning Bidders PN*). The above-captioned application is Mr. Sofio's long-form application for the 28 licenses.

⁶ See 47 C.F.R. §§ 27.1102(a)(2), 1.2110(b).

informally contacted Mr. Sofio to discuss the Commission's reporting requirements including several exhibits that Mr. Sofio needed to file to make his application complete. Mr. Sofio reiterated at that time that he had no affiliates and had entered no agreements relevant to his application. Subsequently, on March 10, 2015, Mr. Sofio amended his application to disclose an affiliate⁷ and to add exhibits.⁸ On March 30, 2015, counsel for Mr. Sofio informed the staff that Mr. Sofio had one disclosable agreement that counsel described as an arms-length loan with an institutional lender.

4. *Confidentiality Request.* On April 2, 2015, in response to multiple staff inquiries, Mr. Sofio provided thirteen agreements, dated April 2, 2015, between Mr. Sofio and ten individuals, one limited liability company, and two trusts.⁹ Mr. Sofio sought confidential treatment for the identities of nine of the individuals, one limited liability company, and two trusts, as well as other details of the agreements.¹⁰ Mr. Sofio did not seek confidential treatment of the names of his mother and sister, explaining that "the Commission's rules presume some kinship affinity based on that level of family relatedness, but for the other lenders there is no reason for their identities to be released."¹¹ Mr. Sofio filed the redacted agreements as attachments to the FCC Form 601, but did not provide summaries of the agreements in Exhibit D to the FCC Form 601 or include the names of the parties to the agreements on FCC Form 601, Schedule B, as required.¹²

5. *Supplemental Confidentiality Request.* On April 21, 2015, in response to further staff inquiries, Mr. Sofio again amended the FCC Form 601 to provide, as attachments to Exhibit D, agreements that were referenced in or superseded by the April 2nd agreements.¹³ Specifically, Mr. Sofio provided one promissory note to a limited liability company, dated October 2, 2014, and twelve promissory notes, dated February 25, 2015, to ten individuals and two trusts, with the promissory note to one of those individuals superseding the October 2nd promissory note to the limited liability company. In a Supplemental Confidentiality Request, Mr. Sofio again sought confidentiality for certain terms and other information set forth in FCC Form 601, Exhibit D, including identities of the parties to the agreements and other parties with whom Mr. Sofio had auction-related discussions.¹⁴ The Supplemental Confidentiality Request argued that the redacted terms in the agreements "constitute 'commercial or financial information obtained from any person', which is an exception to the public disclosure rules identified in Section 0.457(d)."¹⁵ Mr. Sofio also raised the privacy interests of the parties to the agreements as a separate ground for non-disclosure.¹⁶

6. *Letter Order.* On December 2, 2015, the Division partially denied the Request as to confidential treatment of the names of the parties to agreements and of the names of parties that the

⁷ See File No. 0006670108 (filed Mar. 10, 2015) (adding Vault Ventures, LLC as an affiliate with reportable gross revenues of \$231,903.00 for 2013 and average gross revenues of \$115,951.50 for 2011-2013).

⁸ File No. 0006670108 (filed Mar. 10, 2015), Exhibits A and C.

⁹ File No. 0006670108 (filed April 2, 2015), Exhibit D.

¹⁰ Confidentiality Request at 2.

¹¹ Confidentiality Request at 2. See also 47 C.F.R. § 1.2110(c)(5)(iii).

¹² 47 C.F.R. § 1.2110(j); *Winning Bidders PN*, 30 FCC Rcd 630, Attachment D at 12-13.

¹³ File No. 0006670108 (filed April 21, 2015), Exhibit D.

¹⁴ File No. 0006670108 (filed April 21, 2015), Exhibit D (discussion under "Financing Arrangements," including summary of conversations or understandings reached with a party to the agreements prior to and during the auction).

¹⁵ Supplemental Confidentiality Request at 1.

¹⁶ Supplemental Confidentiality Request at 1-2.

Applicant had conversations with or reached oral understandings with prior to and during Auction 97.¹⁷ The Division found that Mr. Sofio failed to demonstrate that such public disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained. The Division did not dispute that the agreements contained financial information obtained from a person, but found that Mr. Sofio had not demonstrated that non-disclosure to the public of the *identities* of parties to agreements with him—an applicant claiming eligibility for DE credits in a competitive bidding auction—was warranted under our rules or was consistent with the Freedom of Information Act (FOIA).¹⁸

7. The Division rejected Mr. Sofio's suggestion that the identities of parties to agreements with DE applicants are "irrelevant to this process"¹⁹ and explained that the disclosure of the names of parties to the agreements is required by the Commission's rules, and that the privacy interests of those parties are minimal as their participation is a business investment. The Division also found that the public interest in disclosure and transparent, open agency evaluation of an applicant's eligibility for DE benefits outweighed any *de minimis* privacy concerns raised by Mr. Sofio.²⁰

8. *Application for Review.* On December 16, 2015, Mr. Sofio filed the instant AFR stating that the *Letter Order* (i) is contrary to the Commission's regulations and case precedent; (ii) represents a novel policy contrary to the public interest that the Commission should review to the extent that it imposes new filing requirements on non-parties to the Application; and (iii) violates the Paperwork Reduction Act to the extent that it imposes a new paperwork obligation.

III. DISCUSSION

A. Required Disclosure of Agreements that Affect Applicant's DE Status

9. In challenging the Division's partial denial of the Request, the AFR first alleges that applicants claiming DE bidding credits are not required to disclose and summarize agreements with lenders and that the Division erred by stating otherwise. Mr. Sofio contends that the *Letter Order* relies on rules that require applicants to identify and provide copies of agreements that support the applicant's claim for DE eligibility, including the establishment of de facto or de jure control, and that all of the examples in the cited rules are agreements concerned with ownership and management rights or leasing rights.²¹ Mr. Sofio avers that "there is nothing whatsoever to suggest that non-equity loan agreements are the kind of agreements that impact an applicant's DE status."²² According to Mr. Sofio, the Commission recently rejected a suggestion that DE eligibility criteria should be changed to make non-equity debt financing a factor in determining DE eligibility.²³ Mr. Sofio also takes issue with the requirement that he file summaries of the agreements.²⁴ Furthermore, Mr. Sofio contends that, because he is an applicant, not

¹⁷ The Division deferred action on any other information covered by the Request and the Commission will continue to keep that information non-public in accordance with Section 0.459(d)(3). *Letter Order* at 6-7.

¹⁸ *Letter Order* at 4. The FOIA is codified at 5 U.S.C. §§ 552 *et al.*

¹⁹ *Letter Order* at 5 (citing Supplemental Confidentiality Request at 1).

²⁰ *Letter Order* at 6. The Division noted that the Request made no effort to demonstrate the applicability of FOIA Exemption 6, which addresses a "clearly unwarranted invasion of personal privacy." *Letter Order* at 6 (citing 5 U.S.C. § 552(b)(6)).

²¹ AFR at 5 (citing *Letter Order* at 6 n.34).

²² AFR at 5.

²³ AFR at 5-6 (citing *Updating Part I Competitive Bidding Rules*, Report and Order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order, 30 FCC Rcd 7493 (2015) (*2015 Competitive Bidding R&O*)).

²⁴ See AFR at 3.

a licensee, the Division erred by referring to 1) a Commission rule that requires licensees that receive DE credits to file annual reports and 2) the instructions to the corresponding FCC form for those licensees.²⁵

10. We affirm the *Letter Order* on this issue. Applicants claiming DE eligibility must demonstrate how they satisfy the requirements and must list and summarize all agreements or instruments²⁶ that support the applicant's eligibility as a small business, including any that establish the presence or absence of attributable material relationships.²⁷ In adopting these rules, the Commission explained the critical importance of reviewing agreements that include auction applicants.²⁸ The Commission stated unambiguously that review would include "agreements to which designated entity applicants and licensees are parties." and required all winning bidders that are DE applicants to "file all relevant contracts, agreements, letters of intent, and other such documents affecting that applicant as part of the long-form application (FCC Form 601)," emphasizing that there would be "careful[] review" of all of those documents once filed."²⁹ Although each rule provides illustrative examples of agreements to be submitted for review, the Commission has been very clear that those lists are neither intended to be exhaustive nor limiting on the Commission's authority to ensure that only eligible applicants are awarded bidding credits.³⁰ Moreover, each list concludes with a requirement to submit "all other agreements" or "any other relevant agreements."³¹ As the Division determined, this includes agreements that relate to the

²⁵ AFR at 5, n.1.

²⁶ In the Request, Mr. Sofio refers to the agreements as "promissory notes" and redacted parties thereto as "lenders" and we use these terms herein for convenience only. See, e.g., File No. 0006670108, Exhibit D: Agreement (dated April 2, 2015) at 1.

²⁷ 47 C.F.R. § 1.2110(j); 47 C.F.R. § 1.2112(b)(1)(iii). See also *Northeast Communications of Wisconsin, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3289, 3290 para. 3 (2000) (*Northeast Communications*); *AMTS Consortium, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 526, 530 para. 15 (2010) (*AMTS Consortium*) (noting that in *Northeast Communications*, "the Commission denied confidential treatment because the submitter had, by requesting a bidding credit, placed in issue the very information which it sought to shield from public scrutiny") (internal quotations omitted). As noted above, Mr. Sofio stated that public disclosure of two individual parties to agreements with him is appropriate under the kinship affiliation rule. See text accompanying note 11, *supra*. We note that this statement does not assist the claim in the AFR that the same agreements with other parties did not require disclosure.

²⁸ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rule Making, 21 FCC Rcd 4753, 4768 para. 42 (2006) (*Second Competitive Bidding R&O*).

²⁹ See *id.* at 4769 para. 44 (noting that this review remains essential to our assessment of designated entity eligibility under the controlling interest standard and will be even more critical in ensuring that the rules and policies adopted . . . are fully effectuated"). The rules provide for the close examination of financing agreements on a case by case basis. *Id.* at 4780 para. 70; see also *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, *Second Report and Order*, 9 FCC Rcd 2348, 2396 para. 272 (1994) ("we intend to scrutinize relationships between parties very carefully to determine if they rise to the level of affiliation. . . . [F]inancing agreements may result in a finding of affiliation the enterprise—for example, if the size of the debt is particularly large, the terms of the loan are not commercially reasonable, and the definition of default is unconventional."). The Commission further noted that Commission staff has carefully reviewed agreements between applicants claiming designated entity status and other existing wireless carriers.

³⁰ See, e.g., *Winning Bidders PN*, Exhibit D at 13 ("...such agreements and instruments include, but not are limited to....).

³¹ 47 C.F.R. § 1.2110(j) (" . . . and all other agreements including oral agreements, establishing as applicable, de facto or de jure control of the entity or the presence or absence of attributable material relationships."); 47 C.F.R. § 1.2112(b)(1)(iii) ("Such agreements and instruments include . . . and any other relevant agreements (including letters of intent), oral or written."); see also *Winning Bidders PN*, 30 FCC Rcd 630, Attachment D at 4 (explaining that an applicant must list agreement name, agreement type, and parties to the agreement in the FCC Form 601,

(continued...)

bidder's financing arrangements.³² Loan documents may contain provisions that can provide the lenders with control or influence over the DE, either outright or under certain circumstances.³³ Such provisions could make the lenders attributable under our rules. Accordingly, the disclosure and inspection of loan documents assist in determining whether there is the "presence or absence of attributable material relationships" under our rules.³⁴ Indeed, established case law cited in the Auction 97 public notice makes clear that "payment of financial obligations" is a critical factor in determining whether DE applicants maintain the *de facto* control essential for their eligibility for such bidding credits.³⁵ The Division therefore properly required Mr. Sofio to submit any documents or agreements with regard to financing.

11. While the Commission declined in the *2015 Competitive Bidding R&O* to adopt a bright-line rule regarding non-equity debt financing, the AFR conflates the disclosure requirements for applicants seeking DE credits with the Commission's rules for attributing revenues or spectrum to applicants claiming DE eligibility.³⁶ Specifically, the Commission rejected a bright-line rule that, *in every case*, would have attributed to a DE applicant the gross revenues and spectrum holdings of any entity holding more than a 10 percent—equity or non-equity—interest in the applicant.³⁷ Thus, the AFR's implication that the Commission has rejected examining non-equity debt financing in determining DE eligibility is incorrect. Although the *2015 Competitive Bidding R&O* cited in the AFR³⁸ is not controlling for Auction 97 applicants, we note that the item is replete with emphasis on the long-established need to review all agreements on a case-by-case basis, including, for example, "loan . . . documents," prior to determining the DE eligibility of an applicant.³⁹ We also disagree that the Division erred by referring to the annual reporting requirement for licensees that receive DE credits.⁴⁰ The *Letter Order* made clear that the annual reporting requirement was not controlling authority for Mr. Sofio's application, but rather

(Continued from previous page) —————
Schedule B and must summarize its agreements in Exhibit D and provide copies of each agreement as part of Exhibit D); FCC Form 601, Schedule B, Instructions at 2 (requiring an applicant to provide the name of the agreement, the parties to the agreement, and to identify the type of agreement).

³² *Letter Order* at 5-6.

³³ See, e.g., *Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, PP Docket No. 93-253, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 455-56 paras. 95-96.

³⁴ See 47 C.F.R. § 1.2110(j).

³⁵ *Auction 97 Auction Procedures Public Notice*, 29 FCC Rcd at 8413 n.151, citing *Intermountain Microwave*, Public Notice, 12 FCC 2d 559, 560, Report No. 1142 (1963).

³⁶ See AFR at 5-6 (citing *2015 Competitive Bidding R&O*, 30 FCC Rcd at 7514-15 para. 49).

³⁷ See *2015 Competitive Bidding R&O*, 30 FCC Rcd at 7514-15 para. 49.

³⁸ See note 23, *supra*.

³⁹ *2015 Competitive Bidding R&O*, 30 FCC Rcd at 7497 at para. 7; see also *id.* at 7509 para. 32 ("As in the past, we will carefully review an applicant's claim of eligibility for bidding credits on a case-by-case basis. In so doing, we will examine the facts in the context of both the specific eligibility standards set forth in our rules, and the totality of the circumstances and facts presented by the applicant. While no two cases are the same and each case must be judged on its own facts, we emphasize that some management, loan, and organizational documents, such as limited liability company agreements, and other types of operational agreements could raise concerns that warrant particular scrutiny as part of our application review.").

⁴⁰ See text accompanying note 25, *supra*. We note that Mr. Sofio's unsupported statement that the Commission abandoned Form 611, *id.*, is incorrect. In 2014 the Commission did propose to repeal the annual DE report—because the information required "is duplicative of information that DEs provide in their auction and license applications." *2015 Competitive Bidding R&O*, 30 FCC Rcd at 7562 para. 161 (citing *Part 1 NPRM*, 29 FCC Rcd at 12453-54 para. 78). In 2015 the Commission decided not to repeal the annual requirement in light of increased flexibility granted to DEs and because "our ability to oversee the award of DE benefits, and our responsibility to prevent unjust enrichment, will be better served by retaining the annual reporting requirement. . . ." *Id.* at 7562 para. 162.

noted that it is a continuing requirement for licensees that receive credits, in addition to being a requirement in the initial application.⁴¹

12. Further, we find no merit to Mr. Sofio's unsupported assertion that the Division erred in requiring Mr. Sofio to summarize the agreements, as required, in Exhibit D to the FCC Form 601. In this regard, the AFR is an untimely petition for reconsideration of the Commission's decision adopting the requirement.⁴² Noting that he has filed the agreements, Mr. Sofio asks "what purpose would be served by 'summarizing' those brief promissory notes."⁴³ Simply put, summaries are required by the rules, and assist the public's review once the application is placed on public notice as accepted for filing and may assist the Commission. We also find no merit to Mr. Sofio's contention that the Division "imposes an unprecedented obligation on the applicant to identify everyone with whom he has had 'conversations' since his application was filed back in 2014."⁴⁴ In the context of the *Letter Order* and the Commission's rules, it is clear that the *Letter Order* requires Mr. Sofio only to identify those with whom he had conversations where those conversations pertained to actual or potential contracts, agreements, letters of intent, etc. regarding his bidding and the licenses on which he is bidding; this obligation includes oral understandings.⁴⁵ Mr. Sofio well understood this requirement, as he disclosed at least some of these conversations in his application under "Financing Arrangements" and "No Strategy Discussions."⁴⁶

13. We therefore affirm the Division's finding that Mr. Sofio is required to submit the referenced agreements as part of his application seeking DE benefits in a Commission auction.⁴⁷ Having affirmed that the information is required, we address the Division's partial denial of the Request.

B. Request for Confidential Treatment

14. Section 0.459 provides that parties may ask that certain information they file be kept confidential – that is, not released to the general public.⁴⁸ A requestor must explain, among other things, how disclosure of the information could cause substantial competitive harm.⁴⁹ A request for confidentiality may be granted only if it is demonstrated by a preponderance of the evidence that non-disclosure is consistent with the provisions of the FOIA.⁵⁰ As is relevant here, the Commission may withhold from public inspection commercial or financial information only to the extent that it is

⁴¹ See *Letter Order* at 6 n.34, citing controlling authority as 47 C.F.R. § 1.2110(j); 47 C.F.R. § 1.2112(b)(1)(iii); *Winning Bidders PN*, Attachment D at 4; FCC Form 601, Schedule B, Instructions at 2, followed by references to the annual report as follows: "47 C.F.R. § 1.2110(n) (imposing a continuing requirement on a designated entity to file agreement(s) as part of an annual report); FCC Form 611-T, Instructions at 2 (providing instructions for the continuing obligation for a designated entity to file agreements);"

⁴² See, e.g., 47 C.F.R. § 1.2110(h) (1994); 47 C.F.R. § 1.2110(j) (2015); 47 C.F.R. § 1.2112(b)(1)(iii) (2015).

⁴³ AFR at 11.

⁴⁴ AFR at 11.

⁴⁵ See, e.g., 47 C.F.R. § 1.2110(j); 47 C.F.R. § 1.2112(b)(1)(iii).

⁴⁶ See File No. 0006670108, as amended Apr. 21, 2015, Exhibit D (n) ("Financing Arrangements"; "No Strategy Discussions").

⁴⁷ We note that auction applicants must familiarize themselves thoroughly with the Commission's general competitive bidding rules, including Commission decisions in proceedings regarding competitive bidding procedures, application requirements, and obligations of Commission licensees. *Auction 97 Procedures Public Notice*, 29 FCC Rcd at 8391 para. 9. The *Auction 97 Procedures Public Notice* also put applicants on notice that "[a]ll bidders must also be thoroughly familiar with the procedures, terms and conditions contained in this Public Notice and any future public notices that may be issued in this proceeding." *Id.*

⁴⁸ 47 C.F.R. § 0.459.

⁴⁹ 47 C.F.R. § 0.459(b)(5).

⁵⁰ 47 C.F.R. § 0.459(d)(2).

privileged or confidential.⁵¹ There must be specific evidence substantiating an assertion that release of a record would cause substantial competitive harm to the person from whom the information was obtained.⁵² The specific evidence must show that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace or "embarrassing publicity attendant upon public revelations."⁵³

15. We find that Mr. Sofio presents only conclusory and generalized allegations and has not substantiated his assertion that disclosure of the identities of the parties would cause substantial competitive harm, either to him or to his lenders.⁵⁴ The record before us provides no specific evidence that any substantial competitive harm likely will result from the affirmative use of the information by competitors, if any, of either Mr. Sofio or his lenders. Nonetheless, we address the assertions in the AFR.

16. *Commercial and Financial Information.* As noted above, the AFR argues that the identities of the parties to agreements with Mr. Sofio is commercial and financial information the public disclosure of which could cause competitive harm to the parties.⁵⁵ As an initial matter, we find that the Division correctly rejected Mr. Sofio's arguments analogizing his situation to "very different proceedings" where "the Commission has afforded sensitive financial information confidential treatment, such as the prices for licenses being acquired in a transfer of control application."⁵⁶ The Commission has distinguished the reporting requirements for a transfer of control of a license received through competitive bidding (47 C.F.R. § 1.2111) from the designated entity provisions set forth in 47 C.F.R. § 1.2110. A DE applicant must file agreements to demonstrate, subject to public scrutiny, that it qualifies for certain bidding credits. By contrast, an applicant seeking approval of a transfer of control must file purchase agreements primarily so the Commission can monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate auction designs and judge whether licenses have been issued for bids that fall short of the true market value of the licenses.⁵⁷ Mr. Sofio is the winning bidder in a public auction, Auction 97, and seeks DE benefits to subsidize his winning bids.⁵⁸ As such, he is required to provide documentation of his qualifications, including the names of parties to agreements relevant to this inquiry. In addition, Mr. Sofio's requests for confidential treatment are contrary to the Commission's consistent experience that applicants seeking DE benefits disclose the names of parties that have entered into agreements with the applicants.

17. Further, Mr. Sofio's argument is based not on competitive considerations, but on the speculation that parties that have entered into financing agreements with Mr. Sofio "might well be subject

⁵¹ See 47 C.F.R. § 0.457(d)(2).

⁵² See *Jurewicz v. United States Dep't of Agriculture*, 741 F.3d 1326, 1331 (D.C. Cir. 2014); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) ("Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents.").

⁵³ *Jurewicz v. U.S.D.A.*, 741 F.3d at 1331; *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1291 n. 30.

⁵⁴ See *Jurewicz v. U.S.D.A.*, 741 F.3d at 1331; *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1291; *Iglesias v. C.I.A.*, 525 F.Supp. 547, 559 (D.D.C.1981).

⁵⁵ AFR at 8 ("Since the general terms of the promissory notes have been provided, disclosure of the lenders' identities would also give outside parties full knowledge of the terms on which they have been willing to make loans, putting them at a serious disadvantage in any future negotiations.").

⁵⁶ *Letter Order* at 5.

⁵⁷ See, e.g., *AMTS Consortium*, 25 FCC Rcd 529 para. 10.

⁵⁸ The amount of the provisionally winning bid for each license is public information.

to solicitations from others . . . once they learn the amounts which have been extended.”⁵⁹ This argument is unavailing. The Court of Appeals for the District of Columbia Circuit has emphasized that the important point for competitive harm in the FOIA context is that it be limited to harm flowing from the affirmative use of proprietary information by competitors.⁶⁰ Mr. Sofio has not demonstrated how the disclosure of the names of parties that have entered into agreements with him would cause substantial harm to the competitive positions of Mr. Sofio or those parties or, more generally, how the identities of the parties are proprietary information that a competitor could affirmatively use to harm Mr. Sofio competitively. Not only is being solicited for loans not a competitive harm, but those amounts (and the terms of the loans) remain non-public, and Mr. Sofio has not shown that the mere identity of the lenders will lead to the harm he describes. The *Letter Order* found only that Mr. Sofio has not justified his request to keep non-public the *identities* of parties to agreements with him—an applicant seeking DE benefits in a Commission auction.⁶¹ We affirm this conclusion.⁶² Withholding from public inspection the identities of those to whom one seeking DE bidding credits has financial obligations would directly conflict with our rules, auction procedures, and precedent discussed above whereas public disclosure will reveal only that certain persons or entities entered into agreements with Mr. Sofio to loan him undisclosed sums at undisclosed rates for unspecified terms for licenses in Auction 97.⁶³

⁵⁹ Request for Confidential Treatment at 2.

⁶⁰ *Public Citizen*, 704 F.2d at 1291.

⁶¹ Revealing identities of parties does not reveal their funding capabilities, *see* Supplemental Confidentiality Request at 2, or the terms on which they have been willing to make loans.

⁶² The *Letter Order* noted that none of the agreements contain non-disclosure provisions. Mr. Sofio acknowledges this point but states that “to the extent that [the parties to the agreements] have protectable rights, he has indicated his willingness to take the steps necessary to preserve those rights.” AFR at 11 n.5. We give no credit to this statement because all agreements and understandings must be reduced to writing and disclosed including any oral understandings that amend previously filed agreements and the record before us reflects no such agreements or understandings. Nonetheless, we note that the absence of non-disclosure provisions is not dispositive of how disclosure of sensitive data could result in harm.

⁶³ The AFR also argues that the names of the lenders cannot be disclosed because the Division has not shown that public disclosure is “necessary” to the review process. AFR at 9, citing *CBS, Inc. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015) (*CBS*). First, because we hold that the information is not competitively sensitive or otherwise confidential, the standard for publicly releasing confidential information does not apply. Second, even were we to treat this information as otherwise entitled to confidential treatment, the AFR is incorrect about the standard that applies. In response to the *CBS* decision, the Commission has held that that otherwise confidential information does not need to be “vital” or “absolutely necessary” to resolving an issue before the Commission before it may be released publicly, *Charter*, 30 FCC Rcd 10360, 10378 para. 36. Rather, as the Commission has long held, we may publicly release confidential business information where the party has put that information at issue in a Commission proceeding or where the Commission has identified a compelling public interest in disclosing the information. *See Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24822, para. 7 (1998). And specifically with regard to information submitted in support of receiving bidding credits in auction proceedings, the Commission has held that both of these criteria are met: that in seeking bidding credits based on certain criteria (here, the aggregate gross revenues attributable to the applicant), the applicant has placed in issue the very information which it seeks to shield from public scrutiny, and that fairness to other participants requires that this information be available to the public; and that there is a compelling interest in having the basis for the bidding credit request be available to the public. *Northeast Communications*, 15 FCC Rcd at 3291, para. 6; *AMTS Consortium, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 526, 530 (2010) (noting that in *Northeast Communications*, “the Commission denied confidential treatment because the submitter had, by requesting a bidding credit, placed in issue the very information which it sought to shield from public scrutiny”) (internal quotations omitted). Here, Mr. Sofio has claimed that he is eligible as a DE to receive bidding credits. He has therefore put his financial status at issue, and consistent with the Commission’s rules and prior decisions, we find that the public and the other bidders in the auction are entitled to know at least the names of the parties to agreements with him related to the application. *See* 47 C.F.R. §§ 0.459(d)(2), 0.461(f)(4); *Lifeline and Link Up* (continued...)

18. The AFR also relies on *Percy Squire*, arguing that the Commission “preserved the confidentiality of the lender’s practices” in that case and “ruled that disclosure of certain loan terms would alert the public to the lender’s ‘practices in dealing with debtors that could prejudice [the lender] in its future business dealings.’”⁶⁴ According to Mr. Sofio, “[i]f the Commission publicly associates the lenders’ names with their business terms here, they would suffer the precise prejudice which the Commission identified and rejected in *Percy Squire*.”⁶⁵ We disagree. As noted in the *Letter Order*, confidential treatment for the identity of the lender was not granted in the *Percy Squire* case.⁶⁶ And, the *Letter Order* partially denied the Request only as to the identities of the parties to agreements and did not require public disclosure of any other redacted information covered by the Request. Indeed, the *Letter Order* did “not dispute that the agreements contain financial information obtained from a person.”⁶⁷ The Division deferred action on any other information in the agreements, including any terms or practices, that Mr. Sofio redacted under the Request and the Commission will continue to keep that information non-public in accordance with Section 0.459(d)(3).⁶⁸

19. *Privacy.* Section IV of the AFR is titled “The Commission Has Not Properly Taken Into Account the Privacy Interests of the Applicant’s Lenders”⁶⁹ but the section does not raise individual privacy claims. Rather, the AFR argues that the identities of the parties to agreements with Mr. Sofio is commercial and financial information the public disclosure of which could cause them competitive harm. In any event, we agree with the Division that the *Letter Order* properly addressed the individual privacy interests of the third parties that have entered into agreements with an applicant seeking DE benefits in a Commission auction. As noted above, disclosure of information about the identities of parties to agreements with an applicant, and in particular agreements relating to the applicant’s financial obligations, is a well-established requirement of Commission rules and precedents; the Commission’s rules and the Bureau’s Auction 97 public notice made clear that the parties’ identities were required to be reported to the Commission. We thus reject Mr. Sofio’s claim in the AFR that “[t]he lenders . . . had no reason to believe that their personal financial information would become a matter of public record and that, at a minimum, their privacy interests would be protected”⁷⁰ is meritless.

20. Mr. Sofio’s claim that, as an applicant seeking DE bidding credits, he need not disclose on FCC Form 601, and that the Commission would not review his loan agreements is equally misplaced. We address the required disclosure of agreements to which DE applicants are parties in our discussion above.⁷¹ To the extent any privacy concern in the mere identification of those who have lent money to Mr. Sofio or otherwise helped finance his bidding has been raised, we find it to be *de minimis*, especially when balanced against the public interest in disclosure of agreements between an applicant for designated entity credits and other parties and in ensuring that the Commission maintains the integrity of the auction and licensing process by being open and transparent. Accordingly, we reject the AFR’s arguments in this regard.

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Reform and Modernization, etc., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7914 para. 284 (2015).

⁶⁴ AFR at 8 (*citing Percy Squire*, 26 FCC Rcd at 14937 para. 16).

⁶⁵ AFR at 8.

⁶⁶ See *Letter Order* at 6-7 (discussion of *Percy Squire*).

⁶⁷ *Letter Order* at 4.

⁶⁸ *Letter Order* at 7 (*citing* 47 C.F.R. § 0.459(d)(3)).

⁶⁹ AFR Section IV, at 7-9.

⁷⁰ AFR at 6.

⁷¹ See, *supra*, paragraphs 9-13.

C. Claim of Disparate Treatment

21. We likewise reject Mr. Sofio's arguments that he is being treated differently than other applicants in Auction 97. We find nothing in the record to support such an allegation. Mr. Sofio alleges that there is at least one other Auction 97 applicant with non-equity debt financing through intervening entities (rather than directly from individuals), which resulted in the public disclosure of the entities rather than all of the persons or entities that funded the loans.⁷²

22. Mr. Sofio also alleges that disclosing the identities of parties to agreements with him is "disparate treatment of small entrepreneurs . . . vis-à-vis large companies who can shield the identities of their actual lenders behind a maze of corporate intermediaries."⁷³ This appears to be an argument that Mr. Sofio's loans were from individuals, and that another unspecified applicant's loan was from a legal entity whose owners were not disclosed. This appears to be another collateral attack on the rules themselves, which require identification of the lender but not of the equity owners of the lender. Every applicant claiming DE benefits is subject to the same disclosure rules and case-by-case analysis.⁷⁴

23. Mr. Sofio also fails to provide evidence to support his particular claim here, which fails based on the record before us on at least two grounds. First, we note that Mr. Sofio himself has entered into agreements with a limited liability company (though, unlike all of the other applicants in Auction 97, only he is unwilling to publicly disclose the identity of that company). Second, Mr. Sofio and the parties with which he has entered agreements chose how to organize their business affairs and the AFR acknowledges that different business structures will result in different public disclosures.⁷⁵ Each applicant is responsible for its own business decisions, and Mr. Sofio cannot claim disparate treatment resulting from his own choices. Mr. Sofio identifies no other DE bidder that has obtained (or even sought) confidential treatment for the mere *identity* of those with which the bidder has entered into financial relationships.⁷⁶ As the Division correctly explained, "to the extent Mr. Sofio is concerned that third parties, acting in good faith, may file pleadings against it based on the disclosure at issue, our confidentiality rules may not be used as a shield against claims that may arise through the discovery of non-confidential information."⁷⁷ We therefore reject Mr. Sofio's claim of disparate treatment.

D. Claim of Violation of the Paperwork Reduction Act

24. Mr. Sofio avers that the *Letter Order* violates the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., (PRA) "[s]ince the Commission has confirmed that non-equity debt financing is *not* to be considered in evaluating DE status, the information now demanded by the Division constitutes a new and significant information collection burden which has not been properly vetted and approved by OMB."⁷⁸ Mr. Sofio's PRA arguments fail because 1) as discussed above, he misinterprets the *2015 Competitive Bidding R&O*,⁷⁹ 2) the clear language of the disputed form, Form 601, Schedule B, Item 15, requires Mr. Sofio to enter the name of the agreement, the type of the agreement, and the parties to the

⁷² AFR at 6. Mr. Sofio does not cite any application.

⁷³ AFR at 7.

⁷⁴ See, e.g., 47 C.F.R. § 1.2110(c)(2) (controlling interest includes individuals or entities with either *de jure* or *de facto* control of the applicant and *de facto* control is determined on a case-by-case basis).

⁷⁵ AFR at 6.

⁷⁶ Mr. Sofio's purported distinction between financial information of the applicant and that of a lender is illusory: a loan to the applicant is obviously "financial information of the very applicant . . . claiming DE status." AFR at 7.

⁷⁷ *Letter Order* at 7.

⁷⁸ AFR at 10.

⁷⁹ See *supra*, para. 11. Moreover, the AFR does not explain how the *2015 Competitive Bidding R&O* could retroactively change the filing requirements for winning bidders in Auction 97.

agreement,⁸⁰ and 3) the Office of Management and Budget approved this information collection under OMB Control No. 3060-0798.⁸¹ Accordingly, Mr. Sofio's allegation under the Paperwork Reduction Act is unavailing.

IV. CONCLUSION

25. Accordingly, Joseph A. Sofio's Application for Review is denied.

26. Because of our denial of the AFR, Mr. Sofio must amend the above-referenced application to make it acceptable for filing by (1) adding the names of parties that have entered into agreements with the Applicant on Form 601, Schedule B, Item 15 (and completing any other information required in FCC 601, Schedule B, Item 15); (2) summarizing those agreements, including providing the names of the parties thereto, in FCC Form 601, Exhibit D; (3) providing, as public attachments to FCC Form 601, Exhibit D, copies of those agreements without the names of the parties thereto redacted; and (4) providing a public version of "Financing Arrangements," attached as the first two pages to the FCC Form 601, Exhibit D, without the names therein redacted.⁸²

27. Pursuant to Section 0.459(g) of the Commission's rules, Mr. Sofio may seek a judicial stay of our denial of the confidential treatment within ten business days of notification of the adoption of this *Memorandum Opinion and Order*.⁸³ If this period expires without action by Mr. Sofio, the materials will be placed in a public file with the names of the parties to agreements with the Applicant no longer redacted in Exhibit D of the FCC Form 601.⁸⁴ The materials will be accorded confidential treatment, as provided in Sections 0.459(g) and 0.461,⁸⁵ until a court acts on any timely motion for stay of the Commission's denial of confidential treatment.

⁸⁰ The instructions to FCC Form 601, Schedule B, Item 15 explain that this "item must be completed. . . . Check the appropriate block to. . . Add. . . Agreements or Party(ies) to Agreements. Enter the unique identifying name of the agreement and check the appropriate block of the party(ies) to agreement for either Entity Name or Individual Name." Schedule B "is used to apply for the required license authorization when the Applicant has been determined to be the winning bidder at the close of an FCC auction. The FCC 601 Main Form must be filed in conjunction with this schedule."

⁸¹ <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3060-0798>. See *Winning Bidders PN*, 30 FCC Rcd 630, Attachment D at 21.

⁸² As discussed above, the materials are *required* pursuant to our designated rules and procedures. Therefore, the materials will not returned to the Applicant. See 47 C.F.R. § 0.459(e).

⁸³ 47 C.F.R. § 0.459(g) (Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this paragraph is the day after the date of oral notice.").

⁸⁴ 47 C.F.R. § 0.459(g). As explained above, Mr. Sofio must also amend the application to add the names of parties that have entered into agreements with the Applicant on Form 601, Schedule B, Question 15 (and completing any other information required in FCC 601, Schedule B, Question 15) and to summarize those agreements, including providing the names of the parties thereto, in FCC Form 601, Exhibit D. If Mr. Sofio fails to do so within ten business days from the date of this *Memorandum Opinion and Order* (if no judicial stay of our denial of the confidential treatment is filed) or from the date of a judicial ruling on our denial of the confidential treatment (unless a court orders otherwise), the application will be subject to dismissal for failure to prosecute. See 47 C.F.R. § 1.934(c).

⁸⁵ 47 C.F.R. §§ 0.459(g), 0.461.

V. ORDERING CLAUSE

28. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(b) of the Commission's rules, 47 C.F.R. § 1.115(b), the Application for Review of Joseph A. Sofio, File No. 0006670108, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary